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**Southwest Gas Corporation and International Brotherhood of Electrical Workers, Local Union 769, AFL-CIO, CLC.** Case 28-CA-16198-1

April 11, 2000

**DECISION AND ORDER**

BY MEMBERS FOX, LIEBMAN, AND BRAME

Pursuant to a charge filed on November 30, 1999, and an amended charge filed on December 27, 1999, the General Counsel of the National Labor Relations Board issued a complaint on January 7, 2000, and an amended complaint (the complaint) on January 11, 2000, alleging that the Respondent has violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Union's request to bargain following the Union's certification in Case 28-RC-5742. (Official notice is taken of the "record" in the representation proceeding as defined in the Board's Rules and Regulations, Secs. 102.68 and 102.69(g); *Frontier Hotel*, 265 NLRB 343 (1982).) The Respondent filed an answer admitting in part and denying in part the allegations in the complaint.

On February 8, 2000, the General Counsel filed a Motion for Summary Judgment. On February 10, 2000, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. On February 24, 2000, the Respondent filed a response. Subsequently, on February 28, 2000, the Charging Party filed a Joinder supporting the General Counsel's Motion for Summary Judgment and requesting that the Board award organizing costs and attorneys' fees and related litigation costs to the Charging Party as part of the remedy for the Respondent's unfair labor practices.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

**Ruling on Motion for Summary Judgment**

In its answer, the Respondent admits its refusal to bargain, but attacks the validity of the certification on the basis of its objections to the election in the representation proceeding.

All representation issues raised by the Respondent were or could have been litigated in the prior representation proceeding. The Respondent does not offer to adduce at a hearing any newly discovered and previously unavailable evidence, nor does it allege any special circumstances that would require the Board to reexamine the decision made in the representation proceeding.<sup>1</sup> We

<sup>1</sup> In its answer and response to the Notice to Show Cause, the Respondent contends that the Board's certification of the Union was obtained as a result of a "fraud" perpetrated on the Board by counsel for the Union in the representation proceeding. That alleged "fraud" is the

therefore find that the Respondent has not raised any representation issue that is properly litigable in this unfair labor practice proceeding. See *Pittsburgh Plate Glass Co. v. NLRB*, 313 U.S. 146, 162 (1941). Accordingly, we grant the Motion for Summary Judgment.

On the entire record, the Board makes the following

**FINDINGS OF FACT**

**I. JURISDICTION**

At all material times, the Respondent, a California corporation, with an office and places of business in Phoenix, Arizona, and various States located throughout the United States, has been engaged in the sale and distribution of natural gas. During the 12-month period ending November 30, 1999, the Respondent, in conducting its business operations described above, derived gross revenues in excess of \$500,000, and purchased and received at its facilities located in the State of Arizona goods and materials valued in excess of \$50,000 directly from points outside the State of Arizona. We find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

**II. ALLEGED UNFAIR LABOR PRACTICES**

*A. The Certification*

Following the election held May 19, 1999, the Union was certified on October 13, 1999, as the exclusive col-

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union counsel's assertion, in briefs filed with the Board in the representation case, that the Union had to intervene in the proceedings of the Arizona Corporation Commission regarding a proposed merger of the Respondent with another gas company when it did, i.e., before the representation election. The Respondent asserts that the Board relied on this allegedly false statement in overruling the Respondent's Objection 8 and in finding two circuit court cases relied on by the Respondent to be distinguishable from the facts presented in the representation case.

We first note that the Respondent raised a similar argument in the representation proceeding in its Reply in Support of Motion for Leave to File Supplemental Evidence. It there claimed that the Union "misrepresent[ed] the evidence of the proceedings before the Arizona Corporation Commission" and that the Union "could have intervened at any time after the May 19, 1999 election and before July 16, 1999." Although the Respondent's reply was properly served on the Board, due to an administrative error it was not brought to the Board's attention and thus was not considered by the Board in the representation proceeding. However, considering that document now, we find no merit in the assertions raised there.

And with particular reference to the "misrepresentation" argument raised by the Respondent in the reply in the representation proceeding and the similar "fraud" argument raised in this proceeding, we find no merit in the Respondent's contentions. As is readily apparent from the Board's decision, the Board did not rely on the union counsel's assertions regarding the timing of the Union's intervention in the Arizona Corporation Commission proceedings in distinguishing the two circuit court decisions relied on by the Respondent. Thus, we find that the Respondent's arguments regarding alleged "fraud" do not raise issues warranting either a hearing or the denial of the General Counsel's Motion for Summary Judgment, but instead are nothing more than an attempt to relitigate the merits of the representation case.

lective-bargaining representative of the employees in the following appropriate unit:

All full-time and regular part-time employees of the Central Arizona Division of Southwest Gas Corporation holding one of the following job classifications: Administrative Secretary, Auto Mechanic, Building Maintenance Mechanic, Building Maintenance Mechanic III, Communications Technician, Communications Specialist, Construction Specialist, Lead Construction Specialist, Construction Technician, Corrosion Specialist, Corrosion Technician, Corrosion Technologist, Crew Leader/Combination, Crew Leader/Construction, Crew Leader Specialist, Customer Representative, Customer Representative/PT, Customer Representative III, Senior Customer Representative, Service Technician, Service Technician/Gas/AC, Lead Service Technician, District Service Technician, Dispatcher, Electronic Mapping Specialist, Assistant Engineer, Engineering Technician, Instrument Technician, Line Locate/Leak Technician, Measurement and Control Technician, Measurement and Control Technologist, Measurement and Control Specialist, Field Representative, Field Representative III, Meter Shop Technician I, Meter Shop Technician II, Representative, Representative/PT, Representative III, Storekeeper, Senior Storekeeper, Welder, New Business Representative; excluding all employees of the Corporate Staff Division, Southern Arizona Division, Southern California Division, Northern Nevada Division and Southern Nevada Division, of the Southwest Gas Corporation, and all temporary employees, exempt account representatives, engineers, distribution engineers, confidential secretaries, guards and supervisors as defined by the Act.

The Union continues to be the exclusive representative under Section 9(a) of the Act.

#### *B. Refusal to Bargain*

Since October 14, 1999, the Union has requested the Respondent to bargain, and, since October 14, 1999, the Respondent has refused. We find that this refusal constitutes an unlawful refusal to bargain in violation of Section 8(a)(5) and (1) of the Act.

#### CONCLUSIONS OF LAW

By refusing on and after October 14, 1999, to bargain with the Union as the exclusive collective-bargaining representative of employees in the appropriate unit, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the Act.

#### REMEDY

Having found that the Respondent has violated Section 8(a)(5) and (1) of the Act, we shall order it to cease and desist, to bargain on request with the Union and, if an

understanding is reached, to embody the understanding in a signed agreement.

To ensure that the employees are accorded the services of their selected bargaining agent for the period provided by the law, we shall construe the initial period of the certification as beginning the date the Respondent begins to bargain in good faith with the Union. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962); *Lamar Hotel*, 140 NLRB 226, 229 (1962), enf'd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817 (1964); *Burnett Construction Co.*, 149 NLRB 1419, 1421 (1964), enf'd. 350 F.2d 57 (10th Cir. 1965).<sup>2</sup>

#### ORDER

The National Labor Relations Board orders that the Respondent, Southwest Gas Corporation, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain with International Brotherhood of Electrical Workers, Local Union 769, AFL-CIO, CLC as the exclusive bargaining representative of the employees in the bargaining unit.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit on terms and conditions of employment, and if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time employees of the Central Arizona Division of Southwest Gas Corporation holding one of the following job classifications: Administrative Secretary, Auto Mechanic, Building Maintenance Mechanic, Building Maintenance Mechanic III, Communications Technician, Communications Specialist, Construction Specialist, Lead Construction Specialist, Construction Technician, Corrosion Specialist, Corrosion Technician, Corrosion Technologist, Crew Leader/Combination, Crew Leader/

<sup>2</sup>As indicated above, the Charging Party has requested that it be awarded attorneys' fees and other costs incurred by it in connection with the litigation of this proceeding. We deny the Charging Party's request because we find that in this case the Respondent's position regarding the certification was not frivolous within the meaning of *Frontier Hotel & Casino*, 318 NLRB 857 (1995), enf. denied in relevant part 118 F.3d 795 (D.C. Cir. 1997). See also *Super K-Mart*, 322 NLRB 583, 585 fn.4 (1996).

Construction, Crew Leader Specialist, Customer Representative, Customer Representative/PT, Customer Representative III, Senior Customer Representative, Service Technician, Service Technician/Gas/AC, Lead Service Technician, District Service Technician, Dispatcher, Electronic Mapping Specialist, Assistant Engineer, Engineering Technician, Instrument Technician, Line Locate/Leak Technician, Measurement and Control Technician, Measurement and Control Technologist, Measurement and Control Specialist, Field Representative, Field Representative III, Meter Shop Technician I, Meter Shop Technician II, Representative, Representative/PT, Representative III, Storekeeper, Senior Storekeeper, Welder, New Business Representative; excluding all employees of the Corporate Staff Division, Southern Arizona Division, Southern California Division, Northern Nevada Division and Southern Nevada Division, of the Southwest Gas Corporation, and all temporary employees, exempt account representatives, engineers, distribution engineers, confidential secretaries, guards and supervisors as defined by the Act.

(b) Within 14 days after service by the Region, post at its facility in Phoenix, Arizona, copies of the attached notice marked "Appendix."<sup>3</sup> Copies of the notice, on forms provided by the Regional Director for Region 28 after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 14, 1999.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a re-

sponsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 11, 2000

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Sarah M. Fox, Member

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Wilma B. Liebman, Member

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J. Robert Brame III, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

#### APPENDIX

#### NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain with International Brotherhood of Electrical Workers, Local Union 769, AFL-CIO, CLC as the exclusive representative of the employees in the bargaining unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit:

All full-time and regular part-time employees of the Central Arizona Division of Southwest Gas Corporation holding one of the following job classifications: Administrative Secretary, Auto Mechanic, Building Maintenance Mechanic, Building Maintenance Mechanic III, Communications Technician, Communications Specialist, Construction Specialist, Lead Construction Specialist, Construction Technician, Corrosion Specialist, Corrosion Technician, Corrosion Technologist, Crew Leader/Combination, Crew Leader/Construction, Crew Leader Specialist, Customer Representative, Customer Representative/PT, Customer Representative III, Senior Customer Representative, Service Technician, Service Technician/Gas/AC, Lead Service Technician, District Service Technician, Dispatcher, Electronic Mapping Specialist, Assistant Engineer, Engineering Technician, Instrument Technician, Line Locate/Leak Technician, Measurement and Control Technician, Measurement and Control Technolo-

<sup>3</sup> If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

gist, Measurement and Control Specialist, Field Representative, Field Representative III, Meter Shop Technician I, Meter Shop Technician II, Representative, Representative/PT, Representative III, Storekeeper, Senior Storekeeper, Welder, New Business Representative; excluding all employees of the Corporate Staff Division, Southern Arizona Division, Southern California Division, Northern Nevada Division and Southern Ne-

vada Division, of the Southwest Gas Corporation, and all temporary employees, exempt account representatives, engineers, distribution engineers, confidential secretaries, guards and supervisors as defined by the Act.

SOUTHWEST GAS CORPORATION